California Law Review Circuit

VOL. 6 NOVEMBER 2015

The Respectable Dignity of *Obergefell v. Hodges*

Yuvraj Joshi*

In declaring state laws that restrict same-sex marriage unconstitutional, Justice Kennedy invoked "dignity" nine times—to no one's surprise. References in *Obergefell*[1] to "dignity" are in important respects the culmination of Justice Kennedy's elevation of the concept, dating back to the Supreme Court's 1992 decision in *Planned Parenthood* v. *Casey*.[2] In *Casey*, "dignity" expressed respect for a woman's freedom to make choices about her pregnancy. *Casey* laid the foundation for *Lawrence* v. *Texas*,[3] which similarly respected the freedom of choice of homosexual persons. Yet, starting in *United States* v. *Windsor*[4] and continuing in *Obergefell*, the narrative began to change. Dignity veered away from respect for the freedom to make personal and intimate choices without interference. Tracing the usage of dignity in these cases reveals that the "dignity" of *Obergefell* is not the "dignity" of *Casey*.

This Essay demonstrates how *Obergefell* shifts dignity's focus from respect for the freedom to choose toward the respectability of choices and choice makers. *Obergefell*'s dignity is respectable in three ways. It depends on same-sex couples (1) choosing the heterosexual norm of marriage; (2) being

DOI: http://dx.doi.org/10.15779/Z38HG3R

* Yale Law School Peter and Patricia Gruber Fellow in Global Justice. This Essay benefited from conversations with Judith Resnik and Reva Siegel, from the thoughtful comments of Jordan Laris Cohen, Robert Leckey, Melissa Murray, Rahel Nega, Britta Redwood, and Jonas Wang, and from the many helpful suggestions of the editors of the California Law Review. Views expressed in this Essay are mine and not those of any organization with which I am affiliated.

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
2. 505 U.S. 833 (1992).
3. 539 U.S. 558 (2003).
4. 133 S. Ct. 2675 (2013).

and showing themselves to be worthy of marriage; and (3) being socially acceptable and accepted. As importantly, I show that *Obergefell*'s reasoning inflicts its own dignitary harms. It affirms the dignity of married relationships, while dismissing the dignitary and material harms suffered by unmarried families. It demands that same-sex couples demonstrate the same love and commitment that are taken for granted in the case of heterosexual couples. And, it implies that legal protection of dignity depends on the prior social acceptance of gay persons and relationships. Put together, *Obergefell* disregards the idea that different forms of loving and commitment might be entitled to equal dignity and respect.

I.
RESPECTABLE DIGNITY

Respectability is a strikingly different notion from *respect*. While the *New Oxford American Dictionary* defines *respectability* as "the state or quality of being proper, correct, and socially acceptable,"[5] it describes *respect* as "due regard for the feelings, wishes, rights, or traditions of others."[6]

Respect connotes acceptance of difference. To be respected is to be treated in a manner that affirms or gives positive deference to one's feelings, wishes, and beliefs, even where others do not share them. A respected person is able to act in ways that are consonant with her sense of true self—her sense of who she is and who she wants to become. Her true self therefore operates unobstructed and her actions in public are authentic. In a public sphere imbued with respect, she can feel a sense of personal and social worth from being her true self.

On the other hand, respectability connotes acceptance of the norm. To be respectable is to follow a normative standard of behavior in public, while being mindful of continual evaluations against that standard. The onus here is not on others to accept difference (as is the case with respect), but rather on oneself to cease to be unacceptably different. In a respectable public sphere, a person cannot feel the same sense of social worth insofar as being her true self is incompatible with being respectable. Her true self does not operate unobstructed because she must modulate her actions in order to become respectable.[7]

Both these meanings can be seen as operative in judicial usage of "dignity." In the case of respect, this seems intuitive. Philosopher Martha Nussbaum considers the idea of dignity so closely related to the idea of respect that we should think of them as "forming a concept-family to be jointly

5. *Respectability*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005).
6. *Respect*, NEW OXFORD AMERICAN DICTIONARY, *supra* note 5.
7. *See* Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415 (2012).

elucidated."[8] Dignity as respect appeals to a person's freedom to make personal and intimate choices without interference. It gives due regard to her feelings, wishes, and beliefs about personal decisions, so that she can make decisions that fulfill her sense of true self and feel a sense of personal and social worth from being her true self in public.

By contrast, dignity as respectability appeals to the social acceptability and worthiness of the personal choices being made and those making them. It affirms decisions because and only insofar as they have and show the qualities that are deemed dignified by a normative standard of behavior. This respectable meaning of dignity is in deep conflict with the intuitive idea of dignity as respect. By demarcating the boundaries of "dignified" choices, it undercuts the freedom to make personal and intimate choices without interference.

It is not surprising that respectability—rather than respect—has emerged as the meaning of "dignity" in *Obergefell*. After all, Justice Kennedy is responding to the claims of a marriage equality movement that has emphasized gay and lesbian couples' sameness and respectability, while downplaying their differences.[9] Yet, *Obergefell*'s understanding of dignity as respectability—forged in one social and constitutional struggle and responding to claims brought by a particular constituency—might be imported to other constitutional contexts. Imagine that constitutional protections for abortion rights depend not on respect for a woman's freedom to make choices about her pregnancy, but rather on the respectability of the woman making the choice.[10] Or, the unconstitutionality of business owners' religious objections to serving LGBT persons depends not on the inherent dignity of those persons, but rather on whether the relevant individual or relationship seemed dignified.[11]

To clarify what is at stake in the meaning of dignity, the remainder of this Essay pays close attention to its use in *Obergefell*. Dignity in *Obergefell* follows a tripartite logic—reasoning through normalcy, worthiness, and acceptability.

---

8. Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 351, 354 (2008).

9. *See* Joshi, *supra* note 7.

10. *See, e.g.*, Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable,* 74 N.Y.U. L. REV. 1220 (1999) (demonstrating how a discourse of respectability that depends on the idea of worthiness has denied respect and protection to women working in prostitution).

11. *Cf.* Melissa Murray, *Accommodating Nonmarriage*, 88 S. CALIF. L. REV. 661, 679 (2015) (observing that the unmarried plaintiffs in *Elane Photography* v. *Willock* and *Craig* v. *Masterpiece Cakeshop* cast their relationships in marital terms, and suggesting that "same-sex couples may resist casting their relationships in nonmarital terms because they desire the respectability and dignity, as well as the public and private benefits that traditionally have accompanied marriages.").

II.
NORMAL CHOICES

When Justice Kennedy first invoked "personal dignity" in *Casey* as a reason to prohibit the government from interfering with a woman's decision to terminate her pregnancy, he grounded dignity in the freedom to choose. He stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[12]

Furthermore, he appealed to the "equal dignity to which each of us is entitled" to show that "[a] woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term."[13] In *Casey*, dignity attached to a woman's decisional autonomy: her freedom to choose, rather than her specific choice.[14] Importantly, women had the freedom not only to choose, but to make a choice that a large segment of American society would condemn.[15] Moreover, women who made different choices concerning pregnancy were entitled to the "same respect" and "equal dignity."[16]

Citing the above passage from *Casey*, Justice Kennedy's 2003 opinion in *Lawrence* ruled sodomy laws unconstitutional on the basis that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[17] *Lawrence* recognized that adults engaged in private, consensual sexual relations "retain their dignity as free persons,"[18] regardless of their sexual orientation and marital status. Dignity here respected homosexual persons' freedom to make choices in their private lives without the threat of criminal sanction. Justice Kennedy observed that a Texas statute that criminalized same-sex sodomy imposed a "stigma" that is "not trivial" in that it

---

12. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

13. *Id*. at 920.

14. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

15. At the time *Casey* was decided, a reported 67 percent of Americans supported restrictions on abortion, with 14 percent favoring an outright ban. *See Abortion*, GALLUP.COM (Aug. 27, 2015), http://www.gallup.com/poll/1576/abortion.aspx [http://perma.cc/BVW3-82E9] (reporting responses to a Gallup/Newsweek poll conducted January 16–19, 1992 among registered voters asking, "Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?").

16. Planned Parenthood v. Casey, 505 U.S. 833, 920 (1992).

17. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

18. *Id*. at 567.

is "a criminal offense with all that imports for the dignity of the persons charged."[19] He held that "[t]he petitioners are entitled to respect for their private lives,"[20] and that "the State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[21]

Granted, *Lawrence* did convey a measure of respectability: Justice Kennedy depicted sexual conduct as "but one element in a personal bond that is more enduring,"[22] even though John Lawrence and Tyron Garner, who were convicted under the impugned Texas statute, were not known to be in a relationship.[23] Nevertheless, Justice Kennedy's opinions in both *Casey* and *Lawrence* showed a strong willingness to affirm dignity as respect for freedom to make personal choices, including choices that diverge from those of others and from social norms. Indeed, *Casey*/*Lawrence* opened the way to achieve same-sex marriage based on respect for the freedom to make different relationship choices, of which marriage is only one form.

Initially, *Obergefell* is certainly evocative of *Casey*: Justice Kennedy appeals to "individual dignity and autonomy"[24] to bolster constitutional protection for same-sex married relationships. But, the "dignity" of *Obergefell* departs from "dignity" in the *Casey* tradition in important respects: it cares more about the specific choices being made and those making them than it cares about the freedom to make personal choices. In *Obergefell*, "dignity" inheres "in the bond between two men or two women *who seek to marry* and in their autonomy to make such profound choices."[25] This "dignity" attaches not squarely to the freedom to make personal choices, but to a specific choice that embodies the norm.

Specifically, *Obergefell* seems to recognize the dignity of one personal choice above all others—the choice to marry. Justice Kennedy begins from an understanding of marriage as an institution that has "existed for millennia and across civilizations"[26] and that "always has promised nobility and dignity to all persons."[27] And, he concludes with the recognition of plaintiffs' claim to "equal dignity in the eyes of the law"[28] so that they are not "condemned to live

19. *Id*. at 575.
20. *Id*. at 578.
21. *Id*.
22. *Id*. at 567.
23. *See* Katherine M. Franke, *The Domesticated Liberty of* Lawrence *v.* Texas, 104 COLUM. L. REV. 1399, 1407 (2004) (arguing that "Justice Kennedy takes it as a given that the sex between John Lawrence and Tyron Garner took place in the context of a relationship"); DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE* V. *TEXAS* 134 (2012) (describing Lawrence and Garner as "casual acquaintances three weeks before" their arrest).
24. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).
25. *Id*. at 2599 (emphasis added).
26. *Id*. at 2594.
27. *Id*.
28. *Id*. at 2607.

in loneliness, excluded from one of civilization's oldest institutions."[29] On this account, it is only *this* choice to marry—not *any* choice about marriage, including the choice *not* to marry—that is dignified.[30] Justice Thomas's dissenting opinion plainly rejects this account, asserting that the decision to marry or not to marry "does not make one person more 'noble' than another,"[31] and "the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious."[32]

In regarding marriage as superior to all other relationships, *Obergefell* diverges from principles of queer liberation and constitutional liberty. Writing in 1989, legal scholar and activist Paula Ettelbrick declared that "[j]ustice for gay men and lesbians will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships."[33] The "dignity" that *Obergefell* invokes expects same-sex couples to make choices regarding their relationships that are the same as the dominant culture. The *Obergefell* Court appears to act as moral custodian to ensure that gay marriages that mimic heterosexual marriage are privileged, while other relationships receive less respect. This is a far cry from the *Casey* Court that recognized its obligation "to define the liberty of all, not to mandate our own moral code."[34]

III.
WORTHY SUBJECTS

By characterizing plaintiffs' dignitary claim as an appeal to be treated as worthy of marriage, Justice Kennedy overlooks the right to dignity of unmarried families. In the oral argument for *Obergefell*, Justice Kennedy put "the whole point" of plaintiffs' dignitary claim in a nutshell: "Same-sex couples say, of course, we understand the nobility and the sacredness of the marriage. We know we can't procreate, but we want the other attributes of it in order to show that we, too, have a dignity that can be fulfilled."[35] This "dignity" is not innate; it must be earned. And it has been earned, arduously and over many years, by demonstrating that lesbian and gay couples are worthy of marriage.

---

29. *Id*.

30. *Cf.* Acción de inconstitucionalidad 2/2010, Pleno de la Suprema Corte de Justicia de la Nación, Novena Época, 16 de agosto de 2010 (Mexico) (describing "human dignity" as "the right of every person to choose, in a free and autonomous manner, how to live her life" which extends to "the freedom to contract marriage or not to; have children and how many, as well as not to have them; to choose their personal appearance; as well as their free sexual option.").

31. *Id*. at 2639 n.8 (Thomas, J., dissenting).

32. *Id*.

33. Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757, 758 (Mark Blasius & Shane Phelan eds., 1997) (emphasis in original).

34. Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

35. Transcript of Oral Argument at 49, *Obergefell*, 135 S. Ct. 2584 (No. 14–556).

The strategy of depicting same-sex couples as "worthy" is apparent in the factual accounts of model plaintiffs that are advanced in same-sex marriage litigation to establish couples' stability and heteronormativity. Mary Bonauto and Douglas Hallward-Driemeier, co-counsel for the *Obergefell* plaintiffs, labored the point of same-sex couples' likeness to heterosexual married couples, pointing out that "[t]he intimate and committed relationships of same--sex couples, just like those of heterosexual couples, provide mutual support and are the foundation of family life in our society,"[36] and that "[t]hese Petitioners have built their lives around their marriages, including bringing children into their families, just as opposite sex couples have done."[37] However, it is perilous to seek to secure the dignity of gays and lesbians by casting same-sex relationships in heterosexual terms, and by eliminating or downplaying the difference that gives rise to indignities. As Ettelbrick cautioned: "The moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices."[38]

It is perhaps ironic that gaining "equal dignity in the eyes of the law" requires same-sex couples to establish the same love and commitment that the law takes for granted in the case of heterosexual couples. But, what is more troubling is overlooking that same-sex and unmarried relationships might adopt different forms of loving and commitment—and that these different intimacies might too be entitled to equal respect and dignity. *Obergefell* itself articulates the dignitary and material injuries to children being raised by unmarried couples, who "suffer the stigma of knowing their families are somehow lesser,"[39] and are "relegated through no fault of their own to a more difficult and uncertain family law."[40] The unhesitating acceptance of the burdens of children of unmarried parents is one of the most striking features of the judgment. *Obergefell* cares deeply about the indignity of same-sex couples being denied the legal, financial and social benefits of marriage. Yet, it cares little about the indignity of those benefits being tied to marital status, and the right to dignity of unmarried families.

IV.
SOCIAL ACCEPTANCE

In describing how gay and lesbian rights came to be protected in the United States, Justice Kennedy implies that social acceptance is required for the legal protection of dignity. In *Obergefell*, Justice Kennedy recounts:

36. *Id.* at 4.
37. *Id.*
38. Ettelbrick, *supra* note 33, at 758.
39. *Obergefell*, 135 S. Ct. at 2584.
40. *Id.*

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. . . . Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.[41]

He goes on to explain that it was "as a result" of "a shift in public attitudes toward greater tolerance" that "questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law."[42] Here, he draws parallels with the law of coverture, which tied women's legal status to marital or kin relationship and was abandoned "[a]s society began to understand that women have their own equal dignity."[43]

Similarly, in his 2013 *Windsor* opinion that declared the Defense of Marriage Act unconstitutional, Justice Kennedy wrote, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[44] But, then "came the beginnings of a new perspective, a new insight." [45] Accordingly, certain states decided to give legal recognition to same-sex marriage, which conferred upon same-sex couples "a dignity and status of immense import."[46]

This framing of the story suggests that legal recognition of minority claims to dignity depends in important respects on majority acceptance. On the logic of the *Obergefell* opinion, just claims to dignity that are unfathomable or unpopular in society shall remain unintelligible in law. Justice Kennedy's appeal to the increased social acceptance of gays and lesbians is likely a response to the "long history of disapproval of their relationships"[47] that has rationalized discrimination against them, as well to the charges of democratic illegitimacy that permeate through the four dissenting opinions.

But, coupling dignity with social acceptance is troubling when social approval becomes the precondition for dignitary claims, or the absence of social approval becomes an excuse for disregarding dignitary injuries. This way of reasoning from "dignity" represents a radical departure for a concept that began in the aspiration to protect "most intimate and personal choices"

41. *Id.* at 2596.
42. *Id*.
43. *Id*. at 2595.
44. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).
45. *Id.*
46. *Id.* at 2681.
47. *Obergefell*, 135 S. Ct. at 2590.

from interference,[48] and an equal protection law that began in the aspiration to protect "discrete and insular minorities" from prejudice.[49] Footnote four of Justice Stone's majority opinion in *Carolene Products* reasoned that because discrete and insular minority groups lacked the political power to protect themselves through the democratic process, one goal of judicial review was to protect against failures in the democratic process. This tradition implies an important counter-majoritarian, minority-protective role for courts—a role that courts begin to relinquish the moment they situate the dignity of a minority group in broader social acceptance, or allow the discreteness and insularity of a minority group to delay the recognition of its dignity.

CONCLUSION

As the oral argument in *Obergefell* progressed, a handful of legal scholars expressed misgivings about the prominence of "dignity" in Justice Kennedy's line of questions.[50] They cautioned that dignity's meaning is contested, and that different meanings of dignity may be invoked to strike down laws concerning gun control, healthcare, or reproductive rights. That dignity's meaning is contested should now be a source of relief. For *Obergefell* offers a respectable meaning of "dignity" that inflicts its own dignitary harms. *Obergefell*'s "dignity" of respectability does not exist comfortably with *Casey*'s "dignity" of respect, now that both exist. These differences in the meaning of dignity matter in practical ways. If we begin from an understanding of dignity as respect for freedom to make personal choices, we are likely to arrive at a different view of dignitary harms than if we care more about the respectability of choices and choice makers.

Fortunately, though dignity's place in constitutional jurisprudence seems entrenched, its meaning is not. Therefore, more respectful and less respectable meanings of dignity might yet prevail in impending cases involving dignitary claims, such as those concerning reproductive rights and religious exemptions to laws of general application.[51] With *Obergefell*, not all is won, and not all is lost.

---

48. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

49. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

50. *See, e.g.*, Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015), http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html, [http://perma.cc/QN3D-XKKC]; Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, THE ATLANTIC (Apr. 29, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796 [http://perma.cc/EN6M-33V9].

51. *See, e.g.*, Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).